FYi

From the Information Policy Analysis Division

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FYi Newsletter is Back!

About two years ago, after budget cuts were made to the dollars appropriated to the public information policy training program, the decision was made to discontinue publication of our quarterly newsletter "FYi."

With the encouragement of the current Commissioner of Administration, Brian Lamb, we are now going to publish FYi as an electronic newsletter. (Among other things, this newsletter is being published with the able assistance of Jim Schwartz, the Department of Administration communications officer and data practices compliance official.)

You are looking at FYi's first all-electronic issue. In this and future issues, we will strive to provide clear and valuable information that will be helpful to government entities in their work at complying with laws relating to information. We also hope to help citizens understand and exercise the important rights conferred on them by the Open Meeting Law, the Data Practices Act and other information policy laws. The newsletter will be published quarterly throughout the State's fiscal year. You should look for a new issue on our website in the first 10 days or so following the end of a quarter. So, look for new issues in early January 2004, early April 2004, and early July 2004. Budget constraints prevent us from providing a notice, so please mark your calendars!

As you will see, we have brought back the kind of articles that received positive feedback when FYi was published before, including articles summarizing case law developments and legislative changes. We also have an article that summarizes opinions issued by the Commissioner of Administration with some emphasis on opinions dealing with controversial or difficult issues. We have added a new advice column to the newsletter entitled "Advice from the Swamp Fox." In that column, we take an issue that we often receive questions about and try to give direct and practical advice on how to deal with that issue in order to help you avoid finding yourself in a swamp up to your waist, surrounded by alligators and other denizens.

The features described above will make up the core of this newsletter. As always we encourage your feedback. This feedback may include but is not limited to:

- Questions you would like to see addressed in the "swamp" or elsewhere;
- Comments on the content and style of the articles or overall content;
- Insight on issues of compliance you would like to share with others;
- Suggestions on features;
- Publicity for a training event;
- Complaints; and
- Offers to write guest columns on any applicable topic.

We will be looking for volunteers for guest columns, so do not be surprised to hear from us.

Please direct your feedback to our division email at info.ipad@state.mn.us. Please tell us what you think. Thank you. We look forward to many issues of a useable newsletter for you.

Information Policy Analysis Division

Minnesota Department of Administration

Session 2003: Responding to Citizens

The 2003 session of the Minnesota Legislature produced a number of changes to both the Data Practices Act (DPA) and the Open Meeting Law (OML). The following is an explanation of the most significant changes. Unless otherwise noted, these amendments were effective on August 1, 2003. This year's "Omnibus Data Practices bill" was enacted in Minnesota Session Laws 2003, Chapter 8, 1st Special Session.

Citizens continue to express concern to the Legislature about compliance with both the DPA and the OML. In response to those concerns, the Legislature made the following amendments. The Commissioner of Administration is now authorized to issue opinions to citizens and to governing bodies about all provisions of the OML. Because of budget constraints, anyone requesting an opinion must pay a $200 fee. (It should be emphasized that opinion requests involving the DPA or other information laws are still available free of charge to citizens and government entities.) Members of a governing body who act in conformity with a Commissioner's opinion involving the OML do not, if sued, have to pay fines, be subject to the forfeiture of office provision of the OML or have to pay a prevailing plaintiff's costs or attorney fees. However, a citizen who receives an OML opinion from the Commissioner is not entitled to take that opinion into court and ask that a judge give the opinion deference

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Opinion Highlights

These are highlights of some recent Commissioner of Administration advisory opinions. All of the Commissioner's opinions are located on our website at www.ipad.state.mn.us. As of September 15, 2003, the Commissioner had issued 614 opinions (the opinion authority became effective on August 1, 1993.)

Request for Proposal responses

On May 23, 2003, Commissioner Brian Lamb issued **Advisory Opinion 03-014** involving the City of Minneapolis. The City asked whether it could release to the public responses to Requests for Proposals (RFPs) with the informed consent of the businesses responding to the RFP. The Commissioner first clarified that the opinion involved issues only governed by Minnesota Statutes, Chapter 13, and did not take into account any state and/or municipal contracting laws that might apply. The Commissioner noted that although Chapter 13 confers rights primarily on individuals, pursuant to section 13.02, subdivision 9, an organization that is the subject of nonpublic data can gain access to those data. The Commissioner, therefore, opined that if an organization can gain access to data of which it is the subject, the organization also should be able to give its consent to have those data released.

Contract pricing information

On June 18, 2003, Commissioner Lamb issued **Advisory Opinion 03-017** involving the Minnesota Department of Transportation (Mn/DOT). Mn/DOT entered into a contract with Zumbro Rivers Constructors (ZRC). Mn/DOT asked about the classification of

the pricing information in ZRC's contracts with its subcontractors, and Mn/DOT's responsibility related to Minnesota Statutes, Chapter 13, if ZRC does not release the data to Mn/DOT. The Commissioner discussed the application of the privatization language in section 13.05, subdivision 11, and opined that the pricing data are public. The Commissioner then discussed Mn/DOT's obligations under section 15.17, the Official Records Act. When read together, sections 15.17 and 13.03, impose an obligation on Mn/DOT to conduct public business so that records are available for public inspection. The Commissioner concluded that Mn/DOT should request the pricing information from ZRC.

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as is the case with opinions dealing with the DPA and related laws.

On the DPA front, the Legislature amended the statute in another attempt to improve compliance. Specifically, the DPA has a remedy that gives citizens the right to sue government entities to get an order from a judge that will require compliance with the DPA. (See section 13.08, subdivision 4.) Prior to the 2003 amendment, a prevailing citizen might be awarded attorney fees. However, with the 2003 change, if a citizen who is bringing an action to compel compliance is doing so after the citizen has gotten a Commissioner's opinion which says that the government entity is not in compliance, the DPA now states that the court shall award attorney fees to the citizen. The amendment makes it clear that the facts presented to the judge have to be the same facts considered by the Commissioner.

The Legislature also began work on policy to deal with the growing reality that many government entities offer services and information through the use of Internet based websites. Polls of citizens indicate privacy concerns about being tracked when doing online transactions. In order to deal with electronic privacy, the legislature did the following: added a section to the DPA classifying the data that is generated by the hookup of a citizen's computer to a government computer as private or nonpublic data; required government entities to inform citizens hooking up to a government computer whether or not the government computer uses "cookie" technology; and prohibited government entities from denying information or services if a citizen refuses to allow the government's computer to install a "cookie" on the citizen's computer. ("Cookie" technology refers to the software capability used in a number of computer systems whereby a host computer actually installs certain information on a computer visiting the website housed on the host computer.)

Lastly, as it does annually, the Legislature classified various types of data as not public. These include: data held by public schools about nonpublic school students; military discharge data that appear on U.S. government forms DD214 and DD215 that often become part of state and local government files; data held in a website operated by the State Archeologist; and data received from employees participating in a self evaluation effort operated by any government entity.

Any questions about the 2003 legislative changes may be directed to IPAD by phone, mail, fax or email.

Advice from the "Swamp Fox"*

(or how to avoid the swampy parts of the Data Practices Act)

**Francis Marion, "the Swamp Fox," was a colonial officer from South Carolina in the Revolutionary War renowned for hiding in swamps while carrying out guerilla warfare against the British.*

Dear Swamp Fox:

We recently received a request to inspect bid responses in our political subdivision. We are reluctant to allow the inspection and so told the requester to come back later as we needed to give the bidders a chance to identify what information within the bid were trade secret data. The requester was very unhappy and yelled at me for 20 minutes in our lobby area. The requester is coming back tomorrow with her attorney. What should I do?

Signed: Nervous Responsible Authority

Dear Nervous:

Thanks for writing so I can help you stay out of the swamp! Did any of the bidders mark any part of their response as "trade secret" or "proprietary?" If there are no markings, the data are public and can be inspected when the requester returns. If a bidder did mark some or all of a bid, then you have some work to do.

Specifically, Minnesota Statutes, section 13.37, subdivision 1(b) on trade secret data leaves the determination of whether the data qualify for protection up to you, Nervous. If the bidder has not already provided it, you will need to get information from the bidder explaining how the elements of section 13.37, subdivision 1(b) are met. It will then be up to you to decide if the statutory requirements for protection have been satisfied.

To deal with the current request, if you have responses that contain only public data, you might want to offer those for inspection and then make the other bids available once you have completed your determination.

For future bids (and requests for proposal, too), the best way to deal with the issue of trade secret data is to include in the request for bids a statement in big, bold letters that all bid responses are public once the bid responses have been evaluated

The Swamp Fox

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Case Update

This update directs your attention to some of the cases issued by Minnesota courts in the last year that may be of interest to you. Additional cases that might be relevant are: (1) *City Pages v. Minnesota,* 655 N. W. 2d 839 (Minn. Ct. App. 2003) (tobacco case billing records not covered by attorney client privilege); (2) *Prairie Island Indian Community v. Minn. Dept. of Public Safety*, 658 N.W. 2d 876 (Minn. Ct. App. 2003) (access to casino audit data; these audit data are not a trade secret); (3) *Star Tribune v. Minnesota Twins Partnership*, 659 N.W. 2d 287 (Minn. Ct. App. 2003) (access to Twins financial information; protective order); and (4) *Bodah v. Lakeville Motor Express, Inc.*, 663 N.W. 2d 550 (Minn. 2003) (privacy tort; publication of Social Security Numbers).

***Wiegel v. City of St. Paul*,** 639 N.W. 2d 378 (Minn. 2002) involved an action to compel compliance with the Minnesota Government Data Practices Act, Minnesota Statutes, Chapter 13 (DPA). The importance of the case relates to who is "aggrieved" and therefore can recover attorney's fees and costs under section 13.08. In this case, the Minnesota Supreme Court found that if a person is entitled, as a matter of right, to access government data and the government denies that access, the person is "aggrieved."

***Star Tribune v. City of St. Paul*,** 660 N.W. 2d 821 (Minn. Ct. App. 2003) addresses the classification of data collected by the City as part of its effort to address the issue of racial profiling. For the period April 15 to December 15, 2000, the City's police officers collected additional data elements for each traffic stop that were analyzed and presented in a summary form. The *Star Tribune* sought access to the raw data and the City refused to provide the names of the officers, citing section 13.43, personnel data. The controlling issue was whether the data documenting the perceived race, color and gender of the driver were data about the police officer (personnel data) or data about the driver (public data). The panel found that the reasons the data were collected were to address personnel issues, that the data document the officer's perception of certain characteristics of the driver, that the data are about the officer, and so are private personnel data.

***Navarre v. So. Washington County Schools*,** 652 N.W. 2d 9 (Minn. 2002) is about the release of personnel data. The Minnesota Supreme Court provided guidance about several provisions in section 13.43, personnel data. First, the Court found that prior to the final disposition of a disciplinary action, subdivision 2(a)(4) only authorizes the disclosure of the existence and status of complaints against an employee, and nothing more. Second, the Court found that the use of the plural (complaints or charges) in subdivision 2(a)(4) means that the number of complaints is public. Third, the Court affirmed the Court of Appeals' determination in *Keezer v. Spickard* (493 N.W. 2d 614) that an individual's mental impressions are not government data. However, the Court made it clear that oral disseminations of data that are derived from recorded data are disclosures of the data within the meaning of the DPA.

Fourth, subdivision 1 of section 13.08 makes a government entity liable to a person who suffers **any damage** as the result of a violation of the DPA (emphasis added). The Court found that "any damage" includes damages for emotional harm and that a plaintiff must meet the burden of proof to recover damages for emotional harm. Fifth, the Court found that when a plaintiff puts his/her emotional state at issue, the defendant is entitled to introduce evidence of a preexisting condition relevant to the claim. The sixth issue resolved by the Court was that damages for loss of reputation are recoverable under the DPA. On remand to the district court, the parties settled the case.

***Westrom v. Dept. of Labor & Industry*,** 667 N.W. 2d 148 (Minn. Ct. App. 2003) involves the civil investigative data provision (section 13.39) and actions by the Department of Labor and Industry in a workers compensation enforcement action. Specifically, the Department issued orders against Westrom and others and gave them time to object. After objections were received, the Department released the orders and objections to the media. One of the appellants, Torrey Westrom, was running for re-election as a state representative at the time the data were released. The Court of Appeals found that because the Department was required to hold the orders and objections in anticipation of further proceedings, section 13.39 classified the data as confidential. The Court did not address the issue that section 13.39 only applies when the chief attorney for the government

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entity determines that there is a civil legal action pending. The Court then found that the workers compensation statute (section 176.181) specifically requires that the Department provide the orders to the employer and that this specific statutory language serves as an exception to section 13.39 that authorizes the release of the orders to the employer.

***Star Tribune Company v. University of Minnesota*,** (Minn. Ct. App. A03-124 filed August 19, 2003) (petition for review filed Sept. 3, 2003) is about the process used to select the president of the University. The Board of Regents decided to interview finalists at closed meetings and refused to disclose the identity of the finalists under the DPA. The district court and Court of Appeals found that the University must comply with the Open Meeting Law (Chapter 13D) and the DPA (Chapter 13). In selecting the president, the regents had not acted in conformity with either law. The Court of Appeals decision affirms a grant of partial summary judgment and so the matter ultimately returns to the district court for further proceedings.

In ***Caledonia Argus v. Whitesitt*,** (File No. C7-02-442, March 27, 2003, Houston County District Court), Judge James Fabian found that the Caledonia School Board had not provided sufficient information following its closed session to evaluate the district's superintendent. Specifically, Judge Fabian found that "strengths were noted and areas of improvement were defined" is not sufficient to meet the Board's obligation to summarize its conclusions regarding the evaluation as is required by Minnesota Statutes, section 13D.05, subdivision 3(a).

Judge Fabian referred to three advisory opinions issued by the Commissioner of Administration (99-018, 02-021 and 02-035 available at www.ipad.state.mn.us) to support the findings that more information could be provided about the superintendent's performance without violating her rights under the DPA.

Information Policy Analysis Division

Questions or comments?

Contact the Information Policy Analysis Division at 201 Administration Building, 50 Sherburne Avenue, St. Paul, MN, 55155; phone 800.657.3721 or 651.296.6733; fax 651.205.4219; email info.ipad@state.mn.us.

Staff: Don Gemberling, Director, Katie Engler, Janet Hey, Brooke Manley, Linda Miller and Catherine Scott.

This document can be made available in alternative formats, such as large print, Braille or audiotape by calling 651.296.6733.

For TTY communication, contact the Minnesota Relay Service at 800.627.3529 and ask them to place a call to 651.296.6733.

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and ranked, unless the bidder wants to claim trade secret protection. If a claim is made, data in the response that the bidder believes to be trade secret data as defined in Minnesota Statutes, section 13.37, subdivision 1(b) should be clearly marked. Additional information explaining how the data meet the trade secret definition should be provided by the bidder in a separate envelope and should be clearly labeled.

A final note: If a bidder marks something as "proprietary," it is not the same as marking it a "trade secret." Make it clear in the request for bids that "proprietary" is not effective and that data must be marked as "trade secret" to engage your attention. The federal Freedom of Information Act does protect proprietary information at federal agencies, so companies often believe the same rules apply at the state and local government level.

The Swamp Fox

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Employer/employee agreements

On September 15, 2003, Commissioner Lamb issued **Advisory Opinion 03-036** involving the City of La Crescent. The *Houston County News* wrote that the City had signed a memorandum of understanding (MOU) with an employee who was leaving his/her job. The City refused to release the MOU and information about the existence and status of any complaints or charges. Commissioner Lamb wrote that if the MOU contains data that constitute "the terms of any agreement settling any dispute arising out of an employment relationship..." those data are public. (See Minnesota Statutes, section 13.43, subdivision 2(a)(6).) If the MOU does not contain those data, the Commissioner, who was not provided with a copy of the MOU, stated he was not able to determine exactly how the data are classified. Commissioner Lamb also noted that the status and existence of any complaints or charges against the employee are public pursuant to section 13.43, subdivision 2(a)(4).

School bus driver names

On September 2, 2003, Commissioner Lamb issued **Advisory Opinion 03-033** involving Independent School District 625, Saint Paul. The District asked about the classification of names of bus drivers provided to the District by contract bus companies. Citing both the privatization clause in Minnesota Statutes, section 13.05, subdivision 11, and the general presumption language in section 13.03, subdivision 1, the Commissioner opined that the names of the bus drivers are public data.

The following opinions may be of interest

03-015: Fox 9 News/KMSP-TV asked the Minnesota Department of Public Safety for a videotape of a police pursuit. The Commissioner opined that the videotape was not the type of arrest data made public by Minnesota Statutes, section 13.82, subdivision 6. Rather, the data in the videotape were confidential/protected nonpublic because the criminal investigation was active, i.e., although the case technically was concluded in district court, the time for bringing an appeal had not run.

03-020: The City of Pequot Lakes closed a public meeting for preliminary consideration of allegations or charges against an employee. The City refused to provide the name of the employee. The Commissioner opined that the employee's name is public because Minnesota Statutes, section 13.43, subdivision 2(a)(4), makes public the existence and status of complaints or charges against an employee.

03-025: A Nobles County policy regarding public access to the "feedlot inventory" contained the following provisions: the requestor must submit a written request; there is a five-day waiting period; the cost for a copy is $250; the copy must be picked up in person; and a copy is available in printed format only. The Commissioner questioned aspects of several of those provisions, but opined that all technically were allowable except the last. The County must provide a copy of the inventory in electronic format if it is reasonably able to do so, pursuant to the requirements of Minnesota Statutes, section 13.03, subdivision 3(e).